In the

Supreme Court of the United States

October Term, 1948

No. 49

VALENTINE GOESAERT, MARGARET GOESAERT, GERTRUDE NADROSKI and CAROLINE McMAHON,
Appellants,

v.

OWEN J. CLEARY, FELIX H. H. FLYNN and G. MENNEN WILLIAMS, Members of the Liquor Control Commission of the State of Michigan,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Michigan

BRIEF FOR APPELLEES

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A

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appellants' brief, p. 32, cannot be decided by the judicial department of government.[31]

Fifth:

Appellants' final contention, id., pp. 34-37, is that § 19a deprives them of their property without due process of law because it is not a valid exercise of state police power.

Our answer is that since *Mugler v. Kansas*, 123 U. 623, and to a degree since ratification of the 21st Amendment,[32] state legislatures have been free to choose absolute prohibition, liberal regulation, or rigid control (as in Michigan), as a solution of the liquor problem; and since there is no inherent, natural, or constitutional right to engage in such a business, it cannot be said that § 19a deprives the platintiffs of any vested interest.[33]

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[31]

E.g., it is urged that the lower court should have considered the alleged fact admitted for the purpose of our motion to dismiss) that the liquor traffic in Michigan is adequately controlled and regulated by previous statutes and the rules of the defendants; but this, in our humble opinion, is purely a legislative question.

[32]

Indianapolis Brewing Co. v. Mich. Liquor Control Comm., 305 U.S. 391.

[33]

Crowley v. Christensen, 137 U.S. 86, 91, and other cases cited in footnote 21.

F (a)

The Argument

Point One[34]

The requirement of § 19a of the Michigan liquor control act, that licenses must first be obtained by a person desiring to act as a bartender in any licensed establishment 'in any city nor or hereafter having a population of 50,000 or more' does not set up an arbitrary or unreasonable classification.

Section 19a of the Michigan liquor control act, added by amendment in 1945,[35] provides in part as follows:

> "No person shall act as a bartender in any establishment licensed under this act to sell alcoholic liquor for consumption on the premises in any city now or hereafter having a population of 50,000 or more, unless such person shall be licensed by the commission under the provisions of this section: *Provided*, That the commission may adopt rules and regulations governing the licensing of bartenders in other political subdivision of the state. . . . "

It is urged that this is an unreasonable and arbitrary classification; that it is not a law limiting the number of bars to certain proportions of population, nor is it a zoning

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[34] Appellants' assignment of error No. 1 (79), brief, pp. 7-9.

[35] Act No. 8, § 19a, Pub. Acts 1933, Ex. Sess., as amended by Act No. 133 Pub. Acts 1945, Mich. Stat. Ann. 1947 Cum. Supp. § 18.990-1.

law; and that no peculiar condition attaches to mixing or pouring alcoholic liquors behind a bar in cities over 50,000 population that does not exist in communities under that population. No authorities are cited in support of counsel's position, and the dissenting opinion (65-74) filed in the court below does not consider the question.

The majority opinion of the lower court rejected (60) this claim on the ground that the legislature may have reasonably concluded that the need for such a license requirement was much more urgent in the larger cities, and held that such classification is not unreasonable and repugnant to the Federal Constitution, citing as ultimate authority the decision of this Court in

Radice v. People of the State of New York, 264 U.S. 292,

upholding a New York statute[36] which prohibited the employment of women in restaurants in cities of the first and second class during the night hours.[37]

We respectfully submit that the authority of *Radice v. New York* controls the first question raised in this cause.

It is also pertinent to note that while the legislature in enacting § 19a of the liquor control act, places a statutory limitation on the commission by requiring licenses for bartenders in cities of 50,000 population or more, it does not limit the commission's power, in the exercise of its *con-*

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[36] Laws of New York, 1917, c. 535, p. 1564.

[37] This law was also sustained as against the further objection that it did not apply to female singers and performers and others enumerated.

stitutional discretion,[38] to 'adopt rules and regulations governing the licensing of bartenders in other political subdivisions of the state'.[39]

Point Two[40]

The Michigan liquor control act, § 19a, does not deny to appellants the equal protection of the laws.

The Michigan liquor control act, § 19a, added by amendment in 1945, requires of any applicant for a bartender's license, the following qualifications:

> "Each applicant for license shall be a male person 21 year or over, . . . : *Provided*, That the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consumption on the premises may be licensed as a bartender by the commission under such rules and regulations as the commission may establish. . . . For the purpose of this act a bartender shall be construed to mean a person who mixes or pours alcoholic liquor behind a bar".

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[38]

We invite the Court to bear constantly in mind the fact that under article 16, § 11, of the Michigan Constitution, the liquor control commission, subject to statutory limitations, exercises "complete control" of the alcoholic beverage traffic within the state.

[39]

Thus, without specific legislative sanction, the commission may require the registration of drivers and helpers of breweries, and may impose a reasonable fee upon them, Kelly v. Michigan Liquor Control Commission, 280 Mich. 693.

[40]

Question II, covering assignments of error Nos. 2, 3, 4, 5, and 6 (79), appellants' brief, p. 10-21; Question III, covering assignment of error No. 7, appellants' brief, pp. 22-31.

Challenging the constitutionality of the foregoing provisions, appellants stake out two separate claims: (1st) that § 19a was an unfair and unjust classification as to sex, an unfair discrimination against women owners of liquor establishments, women bartenders, the daughters of female owners of bars, and an unjust discrimination between waitresses and female bartenders; and (2nd) that § 19a creates an unreasonable and arbitrary classification, and denies to appellants the equal protection of the laws.

Since each challenge rests on the equal protection clause of the Fourteenth Amendment, these two questions may be consolidated and considered as one.[41]

We dispute appellants' claims on three grounds: (1) state legislation regulating or controlling the liquor traffic may, without violating rights preserved by the Fourteenth Amendment, extend the privilege of engaging in the sale of intoxicating liquors at retail, as an employer or employee, upon stricter terms than those which might be imposed upon members of a useful or ordinary calling; and in so doing, the legislature of a State may draw fine lines of distinction; (2) a *fortiori*, Michigan's liquor law creating a commission to exercise complete control of the alcoholic beverage traffic, should not be struck down by a Federal court until it appears beyond any shadow of doubt that it violates constitutional principles; and (3) the second *proviso* of § 19a of the Michigan liquor control act, exempting

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[41]

Counsel would be quick to concede that appellants are in no position to contend that the State had made a law which 'shall abridge the privileges or immunities of citizens of the United States', or that Michigan has violated article 4, § 2, of the Federal Constitution. Laws regulating traffic in liquor may not be challenged on that ground. See cases cited footnotes 15 and 16, Vol. 12 Am. Jur., Constitutional Law, § 467, pp. 126 and 127.

the wife or daughter of the male owner of a liquor establishment, from the general requirement that a licensed bartender shall be a male person, does not set up an arbitrary classification.

1

Since legislation governing the alcoholic beverage traffic falls into its own peculiar category, a State in controlling it, may draw finer lines of distinction in classification than might be permitted in regulating a useful occupation.

This Court long ago drew distinctions between the right to pursue any lawful trade or business, and the privilege of engaging in the sale of spirituous and intoxicating liquors by retail, *Mugler v. Kansas*, 123 U.S. 623. As to the latter, such business may be regulated, or may be absolutely prohibited by state legislation, without violating the Constitution or laws of the United States.

Crowley v. Christensen, 137 U.S. 86, 91.

Speaking for the Court in *Crowley v. Christensen, supra*, Mr. Justice Field said:

> "The sale of such liquors in this way (by retail) has therefore been, at all times, by the courts of every State, considered as a proper subject of legislative regulation. . . . Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privi-

lege of a citizen of the State or of a citizen of the United States. As it is a business attendant with danger to the community it may . . . be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. . . . It is a matter of legislative will only".[42]

In later years the Court upheld the validity of Michigan's local option law, Act No. 207, Pub. Acts Mich. 1889.

Eberle v. Michigan, 232 U.S. 700, 706,

noting that its early decisions[43] show that the State may prohibit the sale of liquor absolutely or conditionally, may prohibit the sale as a beverage and permit the sale for medicinal and like purpose; that it may prohibit the sale by merchants and permit the sale by licensed druggists.

The writer of the treatise, 30 Am. Jur., Intoxicating Liquors, § 39, p. 278, thus sums it up:

"In determining the constitutionality of an enactment, the court must remember that intoxicating liquor, in its nature, is dangerous to the morals, good order, health, and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life, such as corn, wheat, cotton, tobacco, potatoes, etc. Restraints and limitations upon the

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[42] Followed in Cronin v. Adams, 192 U.S. 108.

[43] Kidd v. Pearson, 128 U.S. 1; Rippy v. Texas, 193 U.S. 504; Lloyd v. Dollison, 194 U.S. 445.

liquor traffic may be upheld which might not be sustained as to callings that may be pursued as of common right".

It is significant, we think, that in her able brief, counsel for appellants cites no decision of this Court which strikes down as invalid on the ground of denial of equal protection, any state legislative enactment regulating the sale of liquor.

2

Since the people of Michigan have through their own Constitution established a system of 'complete control' over the alcoholic beverage traffic within the state, any legislative measure passed in furtherance of such a declaration of public policy, should if possible, be sustained by courts of the United States.

We have searched in vain through the dissenting opinion (65-74) in the court below, and through the brief filed by appellants in this Court, for any reference whatsoever to article 16, § 11, of the Constitution of the State of Michigan, as amended in 1932.

The problem here presented cannot be solved intelligently, nor may the legislation here challenged be clearly understood without careful consideration of the source of power exercised by the Michigan liquor control commission, nor may we ignore decisions of the Michigan court of last resort construing the language of the State Constitution.

1. Michigan's system of liquor regulation is unique in that power exercised by the administrative authority comes directly from the people through the State Constitution,

and not from the legislature; and that the Michigan liquor control act merely limits the authority of the commission.

In our counter-statement of the case, *ante*, pp. 2-5, we have set forth a brief history of Michigan liquor legislation, which need not be repeated.

Suffice it to say that in 1932, following unsatisfactory periods of local regulation and prohibition, the people of Michigan amended article 16, § 11, of the State Constitution to provide for a strong, centralized and complete control of the alcoholic beverage traffic, such power to become vested in a liquor control commission created by the legislature and subject only to 'statutory limitations'.

The legislature in 1933, implementing this constitutional mandate, enacted the Michigan liquor control act, created the liquor control commission, and provided (§ 1) in part:[43]

> "Except as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the state of Michigan, including the manufacture, importation, possession, transportation and sale thereof".

This, of course, merely recognized that the source of power delegated to the commission is in the Constitution, and that the function of the legislature is to impose such limitations as it may deem proper upon the control to be exercised by the liquor control commission.[44]

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[43]

Act No. 8, § 1, Pub. Acts 1933, Ex. Sess., Comp. Laws Supp. 1935, § 9209-16, Mich. Stat. Ann. § 18.971.

[44]

Johnson v. Liquor Control Commission, 266 Mich. 682.

The highest court of the State, in construing the language of this provision of the Constitution, has held that the word 'control' means to 'regulate and govern';[45] and that the liquor control commission has inherent power, unless restricted by legislative enactment, to require the registration with it of drivers and helpers of breweries, wineries, distilleries and wholesalers,[46] or to license private clubs to sell and furnish alcoholic beverages under such rules and regulations as it may promulgate.[47]

In short, except as limited or defined by statute, the Constitution of Michigan itself vests the commission with plenary power to control the alcoholic beverage traffic in that State, as appears from the provisions of article 16, § 11, *supra*.[48] Hence, it would seem to follow, the commission was free, until the legislature enacted § 19a of the act, to require that bartenders be licensed.

It thus becomes crystal-clear that the people of Michigan themselves, speaking through the State's fundamental law, have expressed the intent and declared public policy to be that the alcoholic beverage traffic, including the retail sales thereof, shall be suject to the most rigid control;[49] and it

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[45]
Noey v. City of Saginaw, 271 Mich. 595.

[46]
Kelly v. Liquor Control Commission, 280 Mich. 693.

[47]
Liquor Control Commission v. Fraternal Order of Eagles, 286 Mich. 32.

[48]
Terre Haute Brew. Co. v. Liquor Control Commission, 291 Mich. 73, 78.

[49]
Michigan is one of 17 states which, since the repeal of prohibition, National and local, have employed monopoly control of the liquor traffic. See Vol. Four, 'Marketing Laws Survey—State Liquor Legislation', WPA, 1941, Government Printing Office.

is equally plain that no person, under such a system, has a constitutional right to hold a liquor license of any kind;[50] that the sale of intoxicating beverages at retail is a privilege, and that no individual may complain if the legislature or the commission by statute or uniform rule or regulation, withholds such a privilege from any group to which he belongs.

We, therefore, respectfully submit that § 19a of the Michigan liquor control act is entitled to the strongest possible presumption of validity, and that it should if possible, on any conceivable theory, be sustained as against the contention that it violates the due process or equal protection clauses of the Federal Constitution.

3

The second proviso of § 19a, supra, does not set up an arbitrary classification, nor does it violate the equal protection clause.

Appellants urge that § 19a constitutes an unjust classification as to sex because it discriminates against:

(a) women owners of licensed liquor establishments;

(b) women bartenders;

(c) the daughters of female owners of bars; and

(d) between waitresses and female bartenders.

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[50] Case v. Liquor Control Commission, 314 Mich. 632, 643.

and they point out the injustice said to be suffered by members of each group, with special emphasis upon women owners of licensed liquor establishments.

It is our position that the classification set up in § 19a is not nearly so complicated as counsel thinks; that its validity should be judged exclusively by the terms of its second *proviso,* which creates a reasonable *exception* from the general rule; and that so tested, the section evinces no legislative intent arbitrarily or with malice to select as the object of unfair discrimination, or oppression, the members of any particular group listed above.

The language of § 19a here under scrutiny reads:

> "Each applicant for license shall be a male person, . . . *Provided,* That the wife or daughter of the male owner of any establishment . . . may be licensed as a bartender by the commission under such rules and regulations as the commission may establish" . . .

1. Obviously, the section would have been valid if the legislature had stopped with the general clause excluding *all* female persons from the occupation of bartender. While discriminations against women as such are invalid, discriminations against them in matters relating to intoxicating liquors have consistently been upheld, 12 Am. Jur., Constitutional Law, § 497,

> *Cronin v. Adams,* 192 U.S. 108, 144, following
>
> *Crowley v. Christensen,* 137 U.S. 86.

2. Certain rules and tests may be invoked:

> "The legislature is free to make classifications in the application of a statute which are relative to the

legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made",

Asbury Hospital v. Cass County,
326 U.S. 207, 214, per Mr. Chief Justice Stone.

Mr. Justice Reed has said:

" . . . the power of the legislature to classify is as broad as its power to prohibit. . . A violation of the 14th Amendment in either case would depend upon whether there is any rational basis for the action of the legislature",

Sage Stores v. Kansas, 323 U.S. 32, 35, upholding as valid the Kansas 'Filled-milk Law'.

In sustaining a statute of Iowa which granted a permit to deal in intoxicating liquors and required all applicants to be electors, thus excluding women from the privilege, the supreme court of that State had this to say:

"The business of dealing in intoxicants is peculiarly within the control of the State. It may prohibit the traffic in its entirety. It may prescribe the qualifications of the persons to whom the right to sell is granted, and the fact that a permit is given to one person or class of persons neither works nor implies the denial of any constitutional right to the person or class of persons to whom it is refused.

" . . . We think it competent for the legislature to act upon the theory that as a rule retail dealing in intoxi-

cants by women is opposed to sound public policy, and that so long as the State chooses to exercise its right to regulate the traffic and minimize its admitted evils it may constitutionally deny permits to persons of that sex. . . . . The discrimination between the sexes is neither arbitrary nor capricious, and the fact that in many instances individuals of one sex are in general better fitted than those of the other sex for a given occupation or business is one of such common knowledge and observation that the legislature may properly recognize it in enacting regulations therefor".

In re Application of Carragher,
149 Iowa 225, 128 N. W. 352.

In short, the general rule seems to be that the question of such classification is for the legislature whenever there is room for fair debate.

This court, speaking of the reasonableness of a municipal ordinance which conditioned the right to drill for oil or gas within the limits of a city, had this to say:

"Whether the judgment of the common council in the present case was wise, or whether the requirements will produce hardship in particular instances, are matters with which this Court has nothing to do. . . . If there be room for fair debate, this Court 'will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question'. *Zahn v. Board of Public Works,* 274 U. S. 325, 328; *Standard Oil Co. v. Marysville,* 279 U. S. 582."

Gant v. Oklahoma City, 289 U. S. 98, 102.

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BRIEF FOR APPELLEES

B. As counsel correctly states, the prevailing and dissenting opinions of the three judges who heard appellants' application for injunction to restrain the operation of a state statute,[1] are reported in Goesaert v. Cleary, (1947) 74 F. Supp. 735.

C. Counsel's statement of jurisdiction, noted by the Court on May 24, 1948, 68 Sup. Ct. 1340, is likewise accurate.

[1] The three-judge-court was convened pursuant to the Judicial Code § 266, as amended, 28 U.S.C. § 390.

D

Counter Concise Statement of the Case.[2]

Though willing to accept counsel's concise statement, we deem it helpful, if not essential to a clear understanding of the nature of the questions involved, to set forth the following brief history of Michigan liquor legislation:

1. Prior to the era of prohibition, legislative enactments provided no centralized, state-administrative control of the liquor traffic in Michigan, but such laws delegated to municipal authorities the regulation and licensing thereof,[3] or prohibited the sale of intoxicating beverages within defined areas,[4] or to minors,[5] and permitted the exercise of

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[2] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of the record.

[3] Act No. 313, Pub. Acts Mich. 1887, 2 Comp. Laws Mich. 1915, § § 7031-7069, providing for the taxation, licensing and regulation of the business of manufacturing, selling, etc., of spirituous and intoxicating liquors, § 4 forbidding approval of such a license for any woman. Supplemental Act No. 169, Pub. Acts Mich. 1915, 2 Comp. Laws, id., § § 7070-7071.

[4] Act No. 8, Pub. Acts Mich. 1893, 2 Comp. Laws Mich. 1915, § § 7126-7130, forbidding such sales upon waters of State outside boundaries of municipal units; Act No. 189, Pub. Acts Mich. 1887, 2 Comp. Laws Mich. 1915, § § 7131-7132; prohibiting sale or gift of liquor to any inmate of the Michigan Soldiers' Home; Act No. 31, Pub. Acts Mich. 1887, 2 Comp. Laws 1915, § § 7133-7136, forbidding maintenance of saloons etc. within 1 mile of the soldiers' home; and Act No. 110, Pub. Acts Mich. 1915, 2 Comp. Laws 1915, § § 7137-7139, prescribing the sale of liquor, in lumber camps.

[5] Act No. 160, Pub. Acts Mich. 1909, 2 Comp. Laws Mich. 1915, § § 70-72-7075.

local option.[6] The State Constitution was silent on the subject.

2. In November 1916, the people of the State of Michigan amended article 16 of the Constitution of 1908 by adding thereto a section to stand as § 11 thereof which after April 30, 1918 prohibited the manufacture, safe, keeping for sale, giving away, bartering or furnishing of any intoxicating liquors, except for medicinal, mechanical, scientific or sacramental purposes.[7]

Act No. 338, Pub. Acts Mich. 1917, 2 Comp. Laws 1929, § 9138 et seq., Stat. Ann. § 2.331 et seq., implemented the foregoing constitutional provisions.[8]

3. At the general election held in November 1932, the people of the State repealed the prohibition provisions of 1916 by amending article 16, § 11, of their Constitution to read as follows:[8a]

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[6]

Act No. 207, Pub. Acts 1889, 2 Comp. Laws Mich. 1915, § § 7080-7117; and Act No. 381, Pub. Acts Mich. 1913, 2 Comp. Laws id., § § 7118-7125.

[7]

We venture the opinion, gathered from the history of the times, that the people of the State of Michigan ratified the prohibition amendment of 1916 for the reason, inter alia, that they had revolted against corrupt political-ward-czardoms headed by saloon keepers.

[8]

Act No. 309, Pub. Acts 1929, 1 Comp. Laws 1929, § 121, Mich. Stat. Ann. § 2.331, repealed as obsolete the regulatory acts listed in footnotes 3, 4, 5, and 6, ante.

[8a]

The 21st Amendment to the Federal Constitution, was ratified on Dec. 5, 1933. United States v. Chambers, 291 U. S. 317. Hence, it is apparent, these tides of public opinion were National in their sweep.

"The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise *complete control* of the alcoholic beverage traffic within this state, including the retail sales thereof; and the legislature may also provide for an excise tax on such sales: Provided, however, that neither the legislature nor such commission may authorize the manufacture or sale of alcoholic beverages in any county in which the electors thereof, by a majority vote, shall prohibit the same". [Emphasis added].

On December 15, 1933, in furtherance of the foregoing constitution mandate, the act in question creating the Michigan liquor control commission,[9] was enacted.[10]

It is, we think, important to note that all power exerted by the commission emanates from the Constitution, not from the law of its creation.[11]

Section 19a of the act (here challenged on constitutional grounds) was added in 1945 and became effective on the 30th day of April.

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[9]

Act No. 8, Pub. Acts Mich. 1933, Ex. Sess., Comp. Laws Supp. 1935, § § 9209-16-9209-72, Mich. Stat. Ann. § § 18.971-18.1028.

[10]

Between the effective date of the constitutional amendment in 1932, and the effective date of the present liquor control act in December 1933, the liquor traffic was governed by the prohibition statute of 1917, and by Act No. 64, Pub. Acts 1933, which repealed it.

[11]

Decisions sustaining this view are cited in argument. See, e.g., Fitzpatrick v. Michigan Liquor Control Commission, 316 Mich. 83.

In our printed 'Statement Opposing Jurisdiction', p. 3, we were mistaken in asserting that the Supreme Court of the State of Michigan, in the recent case of *Fitzpatrick v. Liquor Control Commission* (Dec. 2, 1946), 316 Mich. 83, 172 ALR 620, upheld the constitutional validity of § 19a of the Michigan liquor control act as against the *identical* objections here urged by appellants, for, unlike the case at bar, no female bar *owners* were parties to that litigation. Hence, the highest court of the State has not yet had occasion to construe the language of § 19a for the purpose of determining whether its provisions require such licensed *owners* also to be licensed as *bartenders*.[12]

E

The Questions Presented.

Counsel for appellants specifies the 11 errors assigned in the printed record (78-80), and in argument groups them under 5 heads, raising as many constitutional questions:

1. Does the requirement of § 19a, that licenses must first be obtained by any person who desires to act as bartender in any establishment licensed under the act to sell alcoholic liquor for consumption on the premises '*in any city now or hereafter having a population of 50,000 or more,*' set up 'an arbitrary and unreasonable classification'?[13]

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[12] Although this is an injunction suit, rather than a declaratory judgment proceeding, we feel we should invite attention to the principles enunciated for the Court by Mr. Chief Justice Stone in Federation of Labor v. McAdory, 325 U. S. 450, 471.

[13] Assignment of Error No. 1 (79), appellants' brief, pp. 7-9.

2. Is § 19a of the Michigan liquor control act (a) an unfair and unjust classification as to sex, or (b) an unfair discrimination against women owners of liquor establishments, (c) women bartenders, (d) daughters of female owners of bars, and (e) between waitresses and female bartenders?[14]

3. Is § 19a of the act repugnant to the 14th Amendment to the Constitution of the United States in that it creates an unreasonable and arbitrary classification, and denies the plaintiffs the equal protection of the laws?[15]

4. Did the court below give adequate consideration to the admitted facts alleged in plaintiff's complaint, and was the majority opinion (59-64) based upon conjecture and supposition?[16]

5. Is the decision of the court below, dismissing plaintiff's compiaint, contrary to the law?[17]

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[14]

Assignments of error Nos. 2-6, inclusive, appellants' brief, pp. 10-21.

[15]

Assignment of error No. 7 (79), appellants' brief, pp. 22-31. It is quite apparent that Questions 2 and 3 are closely related and may be considered as one, since appellants must necessarily rely on the equal protection clause in each instance.

[16]

Assignments of error Nos. 8-10, appellants' brief, pp. 31.34.

[17]

Assignment of error No. 11 (80), appellants' brief, pp. 34-37).

F

Summary of the Argument.

We respectfully state our position on each of the foregoing questions:

First:

We agree with the writer of the majority opinion (60) that the classification by population set up in § 19a is not unreasonable or repugnant to the Federal Constitution. The legislature 'may have reasonably concluded that the need for regulation of women bartenders was much more urgent in the larger cities'. The question is controlled by this Court's decision in

Radice v. People of the State of New York, 264 U.S. 292.[18]

The dissenting member of the court below did not discuss (65-74) this particular question, and we assume he found no fault in the majority opinion on the point (60).

Second:

Third:[19]

1. State legislation governing the alcoholic beverage traffic falls into its own peculiar category and without vio-

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[18] Upholding act prohibiting employment of women in restaurants in N. Y. cities of first and second class, during night hours.

[19] Since Questions II and III are so closely related, they will be considered as one.

lating the Federal Constitution may provide more rigid regulations than those imposed upon useful and ordinary occupations,[20] and hence, we respectfully submit, a State, in controlling such traffic, may draw fine lines of distinction in classification.[21]

2. *A fortiori*, a liquor law enacted pursuant to a constitutional mandate to establish a liquor control commission, who, 'subject to statutory limitations, shall exercise *complete control* of the alcoholic beverage traffic' within the state, should not be invalidated by a federal court on the ground that it contravenes the equal protection clause of the 14th Amendment, unless such violation be found plainly flagrant and without any relation whatsoever to the object of the constitutional provision aforesaid.

3.

(a) The Michigan legislature, in setting statutory limitations upon the liquor control commission's exercise of 'complete control of the alcoholic beverage traffic',[22] could have excluded *all* women from the bars of licensed retail establishments,[23] and it was not bound to extend such

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[20]

This Court has never, in its entire history, declared such a law invalid.

[21]

For authority and e.g., see: Mugler v. Kansas, 123 U.S. 623; Crowley v. Christensen, 137 U.S. 86; Holden v. Hardy, 169 U.S. 366, 392; Cronin v. Adams, 192 U.S. 108; Eberle v. Michigan, 232 U.S. 700, 706; and Hudson Bergen County Retail Liq. Stores Ass'n v. Hoboken, N.J., 52 A. 2d 668, 670. Other decisions will be discussed in argument.

[22]

Mich. Const. 1908, art. 16, § 11, as amended in 1932.

[23]

Anderson v. City of St. Paul, Minn., 1948, 32 NW 2d 528.

regulations to all cases it might possibly reach.[24] And since there is room for fair debate[25] over narrow distinctions which suffice to sustain a legislative classification,[26] it cannot be said with that degree of certainty essential to overcome the strong presumption of validity attending any liquor legislation, that the classification set up in § 19a is wholly arbitrary.

(b) The differences between the classes established by this law are pertinent to the subject with respect to which the classification is made; and therefore § 19a meets the ultimate test of validity.[27]

Specif., it may be noted that if the section here challenged bears any constitutional faults, they lie in its second *proviso*.

The broad, general purpose expressed by the legislature in the body of § 19a is to admit male persons and male persons only to the precincts of the bar in any establishment licensed under the act to sell alcoholic liquor for consumption on the premises, and to exclude all female persons therefrom, and had the language of the section stopped there, it would concededly be valid, but it is

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[24]
West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400; 108 ALR 1330; Fed. of Labor v. McAdory, 325 U.S. 450, 471-472, and cases cited.

[25]
Gant v. Oklahoma City, 289 U.S. 98, 102, and cases cited.

[26]
German Alliance Inc. Co. v. Kansas, 233 U.S. 389, 418; and cases cited, in footnote 21.

[27]
Asbury Hospital v. Cass County, 326 U.S. 207, 214; Sage Stores v. Kansas, 323 U.S. 32, 35; Anderson v. City of St. Paul, 32 NW 2d 528.

"*Provided*, That the wife or daughter of the male owner of any establishment (so licensed) . . . may be licensed as a bartender by the commission under such rules and regulations as the commission may establish".

The only question, then, is whether the two exceptions made in the foregoing *proviso*, are pertinent to the subject of such legislation, and whether such exceptions are unreasonable.

We respectfully submit, in view of the authorities cited, that the relationship between an owner-husband and his wife, or between an owner-father and his daughter, justifies the exceptions made in the *proviso*, and that the exemptions rest upon a reasonable classification.

Fourth:

While it is perfectly true that facts *(well pleaded)* in a complaint, must be considered as true in face of a motion to dismiss (in the nature of a demurrer), it does not follow that conclusions of the law stated in such a complaint may not be questioned.[28]

Appellants contend, brief, p. 21, that the majority opinion below "is based upon conjecture and supposition; that the

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[28]

Vol. II, Michigan Pleading and Practice, § 21.16, p. 14, states the rule: 'It is not the purpose of a pleading to state the legal conclusions or personal opinions of the pleader. Any such statements are surplusage, and have no proper place in pleading. If there are not sufficient averments of fact or ultimate fact to show a cause of action or defense without them, they are insufficient in and of themselves to state one or to bolster inadequate fact allegations'. At the close of the section, however, the author notes that the modern tendency is not to regard such distinctions too critically.

plaintiffs' allegations of fact were admitted, and should have been considered by the lower court'.

We reply:

(1) The majority opinion was not based upon mere conjecture and supposition when it conceived a state of facts that would sustain the validity of the classification set up in § 19a, *supra*. The rule of this Court is that distinction in legislation does not deny equal protection of the law if any state of facts can be conceived that will sustain it;[29] and where a state of facts so conceived, or their effect, might be disputed, the question became one for the legislature to decide, for courts cannot arbitrate such differences of fact or opinion.[30]

(2) The amended complaint (8-14) sets forth few ultimate facts, and any issue of fact suggested therein, or in-

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[29]

Rast v. Van Deman & Lewis, 240 U.S. 357;
Cf. Borden's Farm Products Co., Inc. v. Baldwin, 293 U.S. 194;
Metropolitan Co. v. Brownell, 294 U.S. 580;
Asbury Hospital v. Cass County, 326 U.S. 207, 215.

[30]

Price v. Illinois, 238 U.S. 446, 452-453, where the Court applies the same rule to a question of due process:

"It is plainly not enough that the subject should be regarded as debatable. If it is debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided".

Clearly there is room for fair debate when the question is whether women should be excluded from the occupation of bartender, and whether any members of that general class should be excepted from the rule, and, that being so, the question is exclusively for the lawmakers of the State. Motives cannot be inquired into:

> "This Court cannot inquire into the motives of legislators in enacting laws, except as they may be disclosed on the face of the acts, or be inferrible (sic) from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments".
>
> *Soon Hing v. Crowley,* 113 U. S. 703, 710.
>
> "This Court, on writ of error from a state court cannot inquire into the motives or arguments which influence men to vote for or against a measure",
>
> *Eberle v. Michigan,* 232 U. S. 700, 705.

It is our position that no ulterior motives appearing on the face of the act can be ascribed to the legislators of Michigan in enacting the law here in question.

Another principle here applicable is that the legislature of a State is not bound to extend its regulation to all cases which it might possibly reach.

> ". . . . a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise.

A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Company v. Union County Bank*, 207 U. S. 251".

German Alliance Insurance Co. v. Kansas, 207 U. S. 251.

As Mr. Justice Hughes had occasion to say:

". . . . it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class. A classification based simply on a general description of work would almost certainly bring within the class a host of individual instances exhibiting very wide differences; it is impossible to deny to the legislature the authority to take account of these differences and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will as a whole fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one considered in its general application, the classification is not to be condemned".

Miller v. Wilson, 236 U. S. 373, sustaining minimum-hour law of California which excepted from the benefits of the act certain classes or groups of women employes.

Later, as Chief Justice, this same great jurist also said for the Court:

> "The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulations to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest'. If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might be applied'. There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms (citing authorities)".

West Coast Hotel Co. v. Parrish, 300 U. S. 379, 400.

We pause long enough to observe that this principle sustains the legislative discretion exercised in excluding from the regulation the wife or daughter of a male owner, and in failing to include waitresses within the category. There is no force to the arguments that women who serve liquor at table should be required to be licensed.

See, also, *Federation of Labor v. McAdory,* 325 U. S. 450, 471, where the Court say:

> "The Constitution does not oblige a state to regulate or reform all types of associations and organizations, or none. It may begin with such as in its judgment most need regulation".

It all boils down to this:

Section 19a, *supra*, so far as questioned by appellants, requires *all* bartenders to be licensed, and, in sweeping terms it provides that *all* applicants shall be male persons, which, of course, excludes *all* women from such occupation. Then, by its second *proviso*, the section makes one and only one exception to the general rule: 'the wife or daughter of the male owner of any establishment'.

We respectfully submit, in view of the foregoing principles, that the classification is not invalid, and it should be sustained if for no other reason than that it is based upon the relationship of husband and wife, and parent and child.

Before we close this section of the brief, we desire to correct the impression which counsel seems to have, brief, p. 10, that in the case of *Fitzpatrick v. Liquor Control Commission*, 316 Mich. 83, 172 ALR 608, the Supreme Court of that State decided no federal questions. A careful reading of the opinion will disclose that counsel is mistaken.

While it is true that in the case of *Fitzpatrick*, no woman owner of a licensed establishment appeared as plaintiff, the court did say, 316 Mich. 92:

> "These claims are based, in part, on article 2, §§ 1 and 16, of the Michigan Constitution (1908), and amendment 14, § 1, of the United States Constitution, which are commonly referred to as the due process and equal protection provisions of the State and Federal Constitutions. The essence of plaintiffs' claim in that regard is that they are deprived of equal protection of the law, and that the amendment by section 19a is unconstitutional class legislation".

And in discussing the constitutional questions, the court cited many of the decisions of this Court on which we now rely.

We commend to this Court a reading of the well-reasoned opinion of the Michigan court in the case of *Fitzpatrick*, and we respectfully submit that the liquor control act of that State, § 19a, does not deny to appellants equal protection of the laws.

Point Three [51]

The majority opinion was not based upon mere conjecture or supposition, and it gave adequate consideration to the admitted facts alleged in plaintiffs' complaint.

This point, we think, is fairly-well covered (we hope) in our summary of the argument.

We, as there indicated, rely on the principle so often declared by this Court in the decisions cited in footnote 29, this brief, *viz.*, that where any state of facts can be conceived that will sustain a legislative classification, even though such facts or their effect may be disputed, a distinction does not deny equal protection of the laws. Or, putting it another way, courts will not arbitrate such differences of fact or opinion, since such a prerogative belongs exclusively to the legislature.

Appellants urge, brief, p. 32, that the court below, as well as the State, was bound to accept as true plaintiffs' allegation 'that the liquor traffic is adequately controlled

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[51]

Question IV, appellants' brief, pp. 31-34, assignments of error Nos. 8-10.

and regulated by previous statutes and rules and regulations of the defendants' (6, 13).

Our answer is that if this is sound doctrine, the legislature would be powerless to amend the liquor control act without being subject to judicial review of legislative policy.

Moreover, aside from the foregoing, the complaint sets forth very few facts; the bulk of the pleading consists of legal conclusions.

Point Four [52]

Section 19a, supra, does not deprive appellants of property without due process of law.

Appellants contend that § 19a is not a valid exercise of the police power, the argument being that such legislation is an arbitrary and unjustifiable attempt at classification within a classification, which results in a denial of the equal protection of the laws; and since the result is that those plaintiffs who own liquor establishments 'will either have to close their places of business or hire male bartenders', and since they will lose a vested interest in that event, they are deprived of their property without due process of law.

The question, we think, is controlled by decisions of this Court cited in footnote 21 of this brief, each of which is much to the effect that no one can acquire a vested interest

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[52] Question V, appellants' brief, pp. 34-37, covering assignments of error No. 11.

in the business of selling intoxicating beverages, and that such business comes squarely within state police power.

> "In the exercise of its undoubted power to regulate the traffic in intoxicating liquors, the legislature of a state may lawfully provide a system of licenses to sell at retail, and may impose such restrictions and conditions upon the granting of such licenses; and as to the qualifications necessary to secure them, and may provide such causes for the forfeiture and revocation of licenses, as it may deem necessary and proper".
>
> Black on Intoxicating Liquors, 1892, § 46, p. 61, citing the leading case of *Crowley v. Christensen*, 137 U. S. 86.

So far as we can ascertain, that doctrine has never been abrogated or modified by this Court.

G.

Conclusion

We respectfully submit: (1) that the classification by population set up in § 19a of the Michigan liquor control act, is a reasonable exercise of legislative discretion; (2) that fine or narrow lines of distinction may be drawn by the legislature in regulating the retail sale of liquor; *a fortiori* where, as here, the people of a State have established in their Constitution a system of 'complete control' of such traffic, a stronger presumption of validity should be indulged; and, therefore, the classification of bartenders in § 19a, supra, is not arbitrary; (3) that the court below gave adequate consideration to facts well-pleaded in plaintiffs' complaint; and (4) that § 19a, *supra*, does not deprive plaintiffs of their property without due process of law.

We, therefore, respectfully submit that the judgment of the lower court should be affirmed.

Respectfully Submitted,

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